Supreme Court, U.S.
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No. 97-364

In The

Supreme Court of the United States

October Term, 1996

RAYMOND VINCENT NIDDS,

Petitioner,

v.

SCHINDLER ELEVATOR CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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The parent company of Schindler Elevator Corporation is Schindler Enterprises, Inc., a Pennsylvania corporation. Schindler Elevator Corporation has no affiliates and no subsidiaries.

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INTRODUCTION

Respondent Schindler Elevator Corporation ("Schindler") respectfully urges denial of the petition for writ of certiorari brought by petitioner Raymond Vincent Nidds ("Nidds").

STATEMENT OF THE CASE

Schindler installs and services elevators. Nidds was hired by Service Superintendent Darrell Graham as a service mechanic in the San Francisco Bay Area in 1988, at age 54. In 1990, Bay Area construction (installation) work declined. In slow times, Schindler protects its most skilled workers, the construction mechanics, from competitors' "poaching," by letting service mechanics go and keeping the construction mechanics on staff. In late 1990, Graham told supervisors who reported to him to select one service mechanic each to be laid off from their crews.

Wolter Geesink, age 62, was Nidds' supervisor. He reviewed his crew's performance and skills, ranked them, and on that basis chose Nidds (who ranked lowest) for layoff. He assessed the level of help each needed (Nidds needed the most), their skills and, in particular, their knowledge of Schindler's equipment. Nidds generally performed adequately, but Geesink chose him because, *relative to the others*, Nidds was a poorer performer. Graham accepted Geesink's choice. He knew that "troubleshooters" (experts who help the service mechanics) had been complaining that they were "tired of following [Nidds] around fixing his problems," and that Nidds repeatedly asked them the same questions.

Graham and Geesink explained that the layoffs were due to the business slump, and Graham gave Nidds a letter of recommendation. Graham laid off two other mechanics the same day, ages 36 and 40; eight Bay Area mechanics were laid off in 1990, but the percentage of mechanics over 40 *increased* as a result.[1] Nidds complained to his union, which refused to grieve the layoff. He then went to the California Department of Fair Employment and Housing ("DFEH"), claiming age discrimination.[2]

Graham had made personal commitments to Nidds and the others that they would be the first considered if any of the remaining jobs opened up. A route soon opened in Fresno; Graham offered it to Nidds, who turned it down. In January of 1991, Graham offered Nidds a newly available route in Oakland, which he accepted.

One building, 1800 Harrison, was 60 per cent of the Oakland route and produced $200,000 in annual revenue. The building manager became dissatisfied with Nidds because elevators did not work as well as before, and complained. After months with no improvement, she hired independent consultants and gave Schindler their

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[1] Clerk's Record ("CR"), docket entry No. 99 at Ex. 40, below.

[2] He did this after learning that equipment he serviced was assigned to a younger man, Greg Cardenas, who was promoted from helper to mechanic a few months earlier and had worked well as a mechanic while classified as a helper. Cardenas, hired in 1985, was regarded by troubleshooters and managers as having much better technical skills than Nidds.

report, which had found the elevators were "not operating properly." Schindler tried to help Nidds satisfy her concerns, without success. Due to her complaints and Nidds' weak skills on the type of equipment involved,[3] in early 1992 he was taken off the Oakland route and temporarily placed in Restoration.[4]

In June 1992, a route with equipment more suited to Nidds[5] opened, 40 per cent of which was Geneva Towers, a public housing complex. Other employees had worked there,[6] but Nidds claimed to fear that it was unsafe and

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[3] Nidds' October 1991 evaluation noted, "Ray is always in need of a back up" on the Oakland route.

[4] Restoration mechanics renovate older elevators in locations around the Bay Area, but otherwise function like mechanics assigned to service routes, with the same compensation. The assertion (petition, p. 3) that jobs in Restoration are "punishment" is based only on unfounded personal speculation of a former clerical employee, to which Schindler objected, and is controverted by competent evidence that almost all service mechanics work in Restoration at some point. (See CR 96 ¶ 9, CR 108 ¶ 21, CR 110) The assertion that Nidds was assigned to Restoration in retaliation for his suit (petition p. 3) is an impossibility. He was taken off the Oakland route in April of 1992, and sued in May of 1992.

[5] Graham considered him to be "excellent . . . in the right place, on relay control and not solid state. And that is where we wanted to put Ray . . . [in June 1992], is the work and the control that he is familiar with."

[6] Judge Noonan's dissent states, "Nidds' evidence is that assignment to Geneva Towers was the company's not very nice and not very subtle way of dumping employees . . . . " (petition, App. A, p. 21a). As Schindler pointed out, this "evidence" was *solely* Nidds' inadmissible speculation and opinion; moreover, as Schindler pointed out, he never claimed, before the DFEH or in his civil complaint, that transfer to a route which included

demanded bullet proof clothing.[7] His supervisor noted that there were guards on site if needed,[8] and reminded him that the Restoration job had been temporary. Nidds started work on the new route on June 16.

Barely a week later, Geneva Towers, like 1800 Harrison, began to complain. On June 25, Eli Gray, head of Geneva Towers' security, met with Schindler. He was upset because, among other things, Nidds had left early that day for personal reasons.[9] On June 26, Nidds called a supervisor, Larry Scharfe, from Geneva Towers. He claimed there was a "riot" and that Geneva Towers was preparing for "driveby shootings," and said he was leaving.

Scharfe called Gray and learned that Nidds' story was, at best, a wild exaggeration. Gray explained that there had been an incident at a nearby school the prior day, but Geneva Towers was not affected and certainly was not expecting driveby shootings. Gray committed to provide guards, if necessary, and complained that Nidds was making excuses to leave. He emphasized his unhappiness with Nidds' service and attitude, and warned

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Geneva Towers was discriminatory or retaliatory. (Appellee's brief, pp. 24, 28.) His vituperative speculation therefore was irrelevant, as well as inadmissible.

[7] His justification for the demand was "racial tensions in San Francisco and Los Angeles and the recent riots."

[8] The record shows that there were ten armed guards per shift.

[9] Contemporaneous business records document that Geneva Towers management complained on June 25-26, 1992, that Nidds seemed to regard them as "a number on his [route] sheet" (CR 86 Ex. A) and "makes excuses to leave" the job (CR 64 Ex. A).

Scharfe that Geneva Towers would be making a written complaint about Nidds. Nidds was going on vacation in a few days, so a different mechanic was sent to Geneva Towers pending a decision about how to address the fact that Nidds, once again, had upset a major customer.

From a customer relations standpoint, the abandonment of Nidds' duties on June 26 due to claimed fears of "riots" and "driveby shootings" was a disaster. Arthur Hutton of Geneva Towers called and wrote to Ken Robinson of Schindler, the person with whom Eli Gray met on June 25, just before Nidds was due to return from vacation. Hutton noted, "The environment seems to dictate whether [Nidds] is able to perform his duties . . . " and complained about Nidds' apparent "unwillingness to perform elevator repair work at Geneva Towers." Hutton demanded that Nidds be "relieve[d] . . . from his duties at Geneva Towers Apartments," and asked that a prior mechanic, who had worked well with Geneva Towers' personnel, be reassigned to the account.[10]

When Nidds returned from vacation, Scharfe told him "the situation [Nidds] helped create at Geneva Towers," and informed him that Geneva Towers "insists

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[10] Hutton testified he learned about the Nidds issue from Gray, and wrote the letter shortly thereafter. He was unsure when events occurred, having no personal knowledge, but thought they were recent. (CR 81 at Ex. D, 18:9-19:11; 20:19-24; 25:11-17; 33:23-35:7; 40:17-21; 41:7-19) Schindler managers understood his letter to refer to June 25-26, since that was when Gray complained that Nidds made excuses to leave. (CR 86 ¶ 6) Nidds' assertion that his July 1992 layoff was for failure to service Geneva Towers "on a day he was actually on vacation" (petition, p. 3) is contrary to the record.

that we replace [him] as their mechanic."[11] Scharfe explained to Nidds that this put Scharfe "in a real pickle"; since Geneva Towers was 40 per cent of the route, it meant using a different mechanic for the route. There were no other routes open, and no jobs in Restoration, so Nidds was one of six mechanics laid off by Scharfe and Keith Willerton,[12] Nidds' supervisor, in July of 1992.

REASONS FOR DENYING THE WRIT

The petition asks this Court to:

> 1. Grant the petition for the purpose of deciding how *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), affect a plaintiff's burden of showing pretext at summary judgment, despite the fact that (a) this is a state law case, and *Hicks* is not binding on state courts, (b) *Hicks* had no impact on the result below; and (c) the court of appeals discussed *Hicks* in *dicta* which *accepted* Nidds' interpretation, but concluded that Nidds had not shown even a triable issue as to the veracity of Schindler's explanation;
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> 2. Intrude upon matters which are within the exclusive domain of Congress, by declaring that a single appellate judge has power to reverse a

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[11] Hutton confirmed, in deposition, that this was demanded.

[12] Graham later met with Nidds, at Nidds' request, but Graham was not a decision maker about the July 1992 layoffs.

summary judgment despite the contrary views of the two other panel members; and

3. Declare that summary judgments generally violate the Seventh Amendment, and that the disposition of Nidds' application for continuance of the hearing (a matter within the discretion of the trial court, which was affirmed without dissent) also violated the Seventh Amendment.

The petition's lengthy dissertation on *Hicks* and its progeny is, at heart, merely protective coloration for Nidds' attempt to persuade this Court to micromanage the lower courts' disposition of mundane summary judgment issues. The petition seeks re-review of evidence passed upon twice below, in a case which presents no novel issues of public importance. The writ should be denied.

A. NO SUBSTANTIAL FEDERAL ISSUE IS PRESENTED

1. This Is A State Law Case

Neither Nidds' claims nor Schindler's defenses arise under federal law. Jurisdiction in the district court was based upon diversity of citizenship of the parties, under 28 U.S.C. § 1332.

Nidds claims that his layoff in late 1990 was due to age bias, and that his layoff in July of 1992 was retaliation for protected activity. He sued only under the California Fair Employment and Housing Act ("FEHA"), Cal. Govt. Code § 12940, *et seq.*, although he could have sued under the Age Discrimination in Employment Act ("ADEA"), 29

U.S.C. § 621, *et seq.*, in addition to or instead of the FEHA.[13]

The substantive issues in the case are matters of state law. California courts in FEHA suits are permitted to look to federal cases interpreting similar federal statutes, but are not required to do so.[14] *See, e.g., Romano v. Rockwell Int'l, Inc.*, 14 Cal. 4th 479, 59 Cal. Rptr. 2d 20, 926 P.2d 1114 (1996) (which rejected the statute of limitation accrual rule set out in *Delaware State College v. Ricks*, 449 U.S. 250 (1980)); *Heard v. Lockheed Missiles & Space Co.*, 44 Cal. App. 4th 1735, 1756 n.8, 52 Cal. Rptr. 2d 620, 632 n.8 (1996) (which acknowledged federal case law but concluded, "[W]e disagree with it and decline to follow it"). *See also* Cal. Admin. Code Tit. 2 § 7285.1 (California Fair Employment and Housing Commission regulations).[15]

2. *Hicks* Is Not An Issue In This Case

The petition urges that the writ be granted to harmonize lower courts' analyses of the impact of *Hicks* when an employer seeks summary judgment on the issue of pretext. The question posed is: Must a plaintiff who raises a triable issue as to the truth of the employer's reasons for an allegedly discriminatory job action *also* offer, in

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[13] State common law claims also were brought, but abandoned on appeal. Only age and retaliation claims remain.

[14] The California Supreme Court has not announced whether *Hicks* will be followed in FEHA cases.

[15] In other words, had this suit been litigated in a California court and had Nidds then brought this petition based upon the same disposition and record presented here, it would be denied for want of a federal question. 28 U.S.C. § 1257.

opposing summary judgment, evidence sufficient under *Celotex* to support a verdict that the employer actually acted from discriminatory motives?

This question, however, was not reached here, because Nidds never passed the predicate step – he did *not* raise a triable dispute as to the truth of Schindler's reasons for the layoffs. In the context of this case, it does not matter whether *Hicks* requires evidence of illegal motive *as well as* evidence disputing the truth of the reasons. Here, that question is hypothetical. The interplay between *Hicks* and the general summary judgment standard is of undeniable public interest, but this issue is not framed by the dispute between the parties. *Hicks* did not affect the result, and resolution of that issue would change nothing.[16]

If the lower court erred in discussing *Hicks*, the error had no impact; a close reading of the petition shows this is not a point on which Nidds claims to be aggrieved. He does not contend that the court of appeals misapprehended *Hicks*, or that he would prevail under a different reading. In short, he *does not challenge* the court of appeals' views on *Hicks'* application to summary judgment. (Indeed, Nidds would be hard pressed to complain, since the court of appeals' analysis was the one which he

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[16] The court of appeals' remarks regarding the application of *Hicks* on summary judgment (petition, App. A, p. 13a and n.2) were *dicta*, because the issue on which the various courts have diverged (*i.e.*, whether the plaintiff must offer evidence of discriminatory intent *in addition to* evidence disputing the employer's explanation) was not reached here.

urged below and reiterates here).[17] The petition merely seeks *confirmation* that the court of appeals' statement of a post-*Hicks* plaintiff's burden at summary judgment was correct.

If the petition is granted, Schindler as respondent will be required to brief and argue an issue in which it has, at most, an academic interest. Important legal questions, however, ought not to be resolved by this Court in the context of cases in which the parties have no actual, much less compelling, interest in vigorously participating, thoroughly elucidating, and zealously advocating the competing viewpoints.

3. There Is No Significant Procedural Issue

The petition posits that one court of appeals judge can reverse summary judgment even if two colleagues disagree. Nidds argues that when there is a dissent in a summary judgment appeal, it proves that reasonable minds can differ (the dissenting judge obviously being reasonable), and trial automatically is required. The petition also asserts that long-settled standards for summary judgment violate the Seventh Amendment, and that

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[17] Nidds conceded below that *Hicks* would require him to prove at trial not only that Schindler's explanations for the layoffs were false, but *also* that its real reasons were age discrimination and retaliation. Schindler's motion pointed to the "absence of evidence" for Nidds, and also argued that because *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex, Inc. v. Catrett*, 477 U.S. 317 (1986) require him to oppose the motion with evidence sufficient to support a verdict on all issues on which he has the burden, he must offer evidence of discriminatory and retaliatory motives.

denial of an application for continuance violated the Seventh Amendment.

Decades of jurisprudence confirm that this is not the law, and the petition offers no reason that it should become the law.

a. A Dissent Is Not A Veto

Congress has determined that panels of the courts of appeals shall consist of three judges each. 28 U.S.C. § 46. Its power to determine the composition of the lower courts is conferred in Art. I, § 8 of the United States Constitution.

The petition, however, would have this Court declare that on review of summary judgment, a single dissenting judge may veto two colleagues who believe the judgment should be affirmed. No such veto power was granted by Congress, and the petition offers no basis on which this Court could infer it.

b. The Argument Has No Merit

Nidds asserts that the fact that there was a dissent in the lower court shows that summary judgment was improper, arguing that a dissent necessarily demonstrates that differing reasonable inferences can be drawn. Thus, he contends, the bare fact of a dissent means that summary judgment was required to be reversed.

Nidds' theory would completely undermine the effectiveness of Fed. R. Civ. P. 56 – a procedural tool which has been emphatically endorsed by this Court –

and essentially would overturn 60 years of authority following the adoption of Rule 56 in 1938. *See* Advisory Committee Note to Rule 56 (Sept. 16, 1938). Indeed, such precedential authorities as *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) all were, according to this logic, incorrectly decided, because in each there was a dissent.

First, a brief perusal of this Court's opinions readily shows that a dissenting opinion about inferences to be drawn from evidence on summary judgment does not mandate reversal. *See, e.g., Matsushita*, 475 U.S. at 599-601, in which Justices White, Blackmun, and Stevens dissented on the issue of the standard to be applied in drawing inferences from the evidence offered in a summary judgment motion.

Second, no inference of pretext arises from even a charitable view of the record, as discussed below at Section B. A nonmoving party is entitled to favorable inferences which are reasonable, legitimate, and drawn without resort to speculation. *Matsushita*, 475 U.S. at 587-88. Inferences may not be based on "threadbare conclusory statements instead of 'significant probative evidence.' " *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680-81 (9th Cir. 1994) (citing *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977)). The nonmoving party is not entitled to unreasonable inferences, or ones "at war with the undisputed facts." *Sip-Top, Inc. v. Ekco Group, Inc.*, 86 F.3d 827, 830 (8th Cir. 1996) (quoting *Schneider v. Chrysler Motors Corp.*, 401 F.2d 549, 555 (8th Cir. 1968)). There is a "limit on the extent of the inferences that may be drawn in the nonmoving party's

favor," or Rule 56 "would be entirely gutted." *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). Nidds' inferences violate these principles.

Finally, Nidds' argument contravenes principles applicable to judgment notwithstanding verdict under Fed. R. Civ. P. 50 (the standard applicable to summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250). On j.n.o.v., the court construes evidence in favor of the prevailing party, gives that party the benefit of reasonable inferences, and reverses if the court finds that the evidence could lead a reasonable factfinder to just one conclusion. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 744 n.11 (1983).[18]

4. There Is No "Constitutional Issue"

Nidds argues that the summary judgment violated his Seventh Amendment right to a trial and, as such, mandates that his petition be granted and that the lower court's decision be reversed. This Court, however, has repeatedly upheld summary judgments and directed verdicts in the face of Seventh Amendment challenges. Nidds offers no basis for departure from this long line of

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[18] By definition, j.n.o.v. motions are brought only *after* a factfinder (*i.e.*, six or more "reasonable minds") has come to the opposite conclusion from that urged by the moving party *after* considering the same evidence considered by the court in the motion. Nevertheless, judgment will be entered contrary to the verdict if the court finds that, regardless of what the jury found, the only reasonable inference from the evidence is *not* the one drawn by the "reasonable minds" comprising the jury. *See, e.g., Galloway v. United States*, 319 U.S. 372, 385-86 (1943).

authority. *Galloway v. United States*, 319 U.S. 372 (1943) (directed verdict upheld over constitutional challenge); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S 317, 321-22 (1967) (judgment notwithstanding verdict does not violate Seventh Amendment); *Anderson v. Liberty Lobby, Inc.* 477 U.S. at 249 (reversing denial of summary judgment and noting that there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party).

Nidds also alludes to an alleged deprivation of discovery and to the trial court's failure to continue the hearing on the motion. In fact, additional discovery was allowed at his request and the hearing was continued. The court of appeals upheld the trial court's exercise of discretion (petition, App. A, pp. 19a-20a). Nidds does not show how this result is open to question, much less does he explain how it presents a constitutional issue.

B. THE RESULT BELOW WAS CORRECT

1. Summary of Discussion

Under Rule 56(c), a moving party must point to an absence of evidence to support judgment for the other party. *Celotex Corp. v. Catrett*, 477 U.S. at 325. Conversely, the nonmovant must offer evidence of "specific facts showing that there is a genuine issue for trial." *Id.* at 324. A defendant's motion is granted if a plaintiff fails to support essential elements on which he has the burden at trial. *Id.* at 322.

Nidds claims that his 1990 layoff was age discrimination. Age discrimination claims alleging disparate

treatment "cannot succeed unless the employee's protected trait actually played a role in [the disputed decision] and had a determinative influence on the outcome." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Nidds' *prima facie* case relied upon the presumption which arises upon proof of factors set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). California courts also apply these factors under the FEHA. *See, e.g., County of Alameda v. Fair Employment and Housing Comm'n*, 153 Cal. App. 3d 499, 200 Cal. Rptr. 381 (1984).

Nidds claims that his April 1992 transfer to Restoration was retaliation for his 1990 DFEH complaint, and that his July 1992 layoff also was retaliatory. Under the FEHA, a *prima facie* case of retaliation exists if a plaintiff engages in protected acts (*e.g.*, filing a discrimination charge), suffers adverse job action, and shows a causal link between the two. *Fisher v. San Pedro Peninsula Hospital*, 214 Cal. App. 3d 590, 614, 262 Cal. Rptr. 842, 855 (1989). Causation may be shown by direct or circumstantial evidence. *Id.*

In both discrimination and retaliation claims, the *prima facie* case is rebutted by pointing to evidence of proper reasons for the adverse action. *Addy v. Bliss & Glennon*, 44 Cal. App. 4th 205, 216-17, 51 Cal. Rptr. 642 (1996). If the employer does so, it is entitled to judgment unless the plaintiff shows that there is a triable issue as to the truth of the proffered explanation.[19]

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[19] As noted above, Schindler disagrees with Nidds and with the court of appeals, as to what evidence a plaintiff must offer in order to avert summary judgment after the employer states its legitimate reasons. Schindler contends that, as Nidds

Schindler's explanation for the 1990 layoff was that work declined and Nidds ranked lowest on his crew. Its explanation for the April 1992 move to Restoration was that he jeopardized a $200,000 account. Its explanation for the July 1992 layoff was that Nidds so antagonized a major customer that the customer demanded a different mechanic, and there was no other job for him.[20] The lower court correctly held that Nidds raised no triable issue about any, much less all, of these points.[21]

2. Pretext Regarding The Age Claim

Nidds was hired in 1988 at age 54 by Graham and selected for layoff in 1990 at age 56 by Geesink (who was 62), with Graham's concurrence. Graham and Geesink were consistent that Nidds was laid off because in general, the business slump required layoffs and specifically, he was the least skilled and most expendable of Geesink's crew. The 1990 downturn and reduction in force were not

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would have to prove at trial that the "real reason" was discrimination or retaliation, he was required by *Celotex* to offer such evidence on summary judgment, particularly since his *prima facie* case was circumstantial only. *See Schuler v. Chronicle Broadcasting Co.*, 793 F.2d 1010,, 1011 (9th Cir. 1986); *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983). This issue was not reached, however, as Nidds did not raise a triable issue even as to the truth of Schindler's stated reasons.

[20] The record establishes that in July of 1992, Schindler was in the midst of another reduction in force. Nidds was one of seven mechanics laid off that week.

[21] As to the transfer to Restoration, the court also concluded that this was not "adverse," because the job duties and compensation were identical to those on a service route.

genuinely disputed,[22] nor were Geesink's methods or reasons for choosing Nidds as one of those to be laid off in late 1990.

Since Schindler gave legitimate reasons for the 1990 layoff, Nidds was required to offer evidence that its reasons were a pretext for age bias. He argued: (1) there was no business slump, (2) the explanation changed over time, and (3) there is anecdotal evidence that Graham had made two age-biased remarks.

The court of appeals correctly found that Nidds failed to create a material issue as to pretext.

a. The Business Slump and Nidds' Relative Skills Were Legitimate Reasons for Laying Nidds Off

In the 1990 layoff, there were two decision makers. Nidds' supervisor, Geesink, chose him (and Nidds testified that Geesink did not discriminate). The other was Graham, who *hired* Nidds in 1988 and offered him not one, but *two*, jobs in January of 1991.[23] Graham assertedly discriminated by concurring in Geesink's choice.

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[22] The Petition's contrary assertion (Petition, p. 13) is unavailing. It is based on unfounded speculation by a former clerical employee (to which Schindler objected) and on a newspaper article regarding Schindler's business in other geographic areas (to which Schindler also objected). More pertinently, the argument ignores the documented 1990 eight-person *reduction* in Schindler's Bay Area elevator mechanic staff. (*See* CR 99 Ex. 40)

[23] Several courts hold that if one person in a short time both hires and fires the plaintiff, there is a "strong inference of nondiscrimination" as to the firing. *See, e.g., Bradley v. Harcourt,*

There is no "probative" evidence disputing Schindler's showing about either the business slump, or Nidds' skills and performance compared to others'. *Schuler v. Chronicle Broadcasting*, 793 F.2d at 1011. The lower court correctly held that Schindler's evidence rebutted Nidds' *prima facie* case.[24]

b. "Pretext" Evidence Was Legally Insufficient

Nidds' pretext argument claims that Schindler "changed positions" about the reasons for his layoff and that a trial is required as to the truth of its reasons. He points to a May 1991 answer to the DFEH charge, signed by Ginnie Ross of Schindler, which said the layoff was for "lack of work." Due to oversight, it did not describe the selection process as well (the comparison of Nidds with his peers), although the record shows that Ms. Ross had the information.[25] Since the original answer did not

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Brace & Co., 104 F.3d 267 (9th Cir. 1996); *Brown v. SCS Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996); *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991).

[24] The petition argues (pp. 3, 24) that since Nidds was offered new positions in early 1991, there was no reduction in force in 1990 and the case should go to trial on the issue of pretext. However, he fails to discuss *undisputed* evidence that the Bay Area mechanic staff was reduced by eight slots in 1990; likewise undisputed is the evidence that at Nidds' layoff, Graham told him that if there were openings among the remaining jobs, he and the others who were being laid off would be the first considered for those openings.

[25] *Nidds* put in the record evidence that *in February 1991* (just after the layoff) Ms. Ross received Graham's statement that "Ray Nidds was laid off because there were *other mechanics*

describe the selection process,[26] Nidds relied on cases where an employer's stated reason was found not credible after it gave multiple antithetical explanations.[27]

The court of appeals correctly disagreed that this was a case of incompatible explanations. The record shows that the decision makers (Graham and Geesink) *always* have said that in general the layoffs were due to slow business, and that it was Nidds' relatively lower skills and performance that caused him to be one of the mechanics selected for layoff in 1990.[28]

Nidds also argues that anecdotal evidence shows that the stated reasons for the 1990 layoff were untrue and a pretext for age discrimination. He relies on Roland

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that . . . *were more qualified on our equipment.*" (CR 97 Ex. B [emphasis added])

[26] The reasons for omission of that detail are unknown. Shortly after Schindler answered, however, the DFEH was provided with the complete information. (CR 82 Ex. T, W)

[27] *See, e.g., Siegel v. Alpha Wire Corp.*, 894 F.2d 50 (3d Cir. 1990), where the decision maker gave plaintiff's supervisor an explanation completely different from that which he later gave in response to the litigation.

[28] Nidds' reliance on *Lindhal v. Air France*, 930 F.2d 1434 (9th Cir. 1991) is misplaced. The *Lindhal* decision makers had never mentioned an allegedly crucial attribute (computer skill) which the employer said was a basis for its decision (and that skill never was a requirement for the position). In addition, the employer claimed it selected the successful candidate for leadership ability, but evidence showed he was disliked by subordinates. 930 F.2d at 1438. Here, the decision makers were consistent that Nidds' relative skills and performance were the basis on which Geesink selected him for layoff; his contrary argument is based solely on a brief mixup in conveying their reasoning to the DFEH.

Beisenstein, a former employee who the record shows has not worked for Schindler since 1989 (i.e., well before the late 1990 layoff), who claimed he heard an age-biased remark by Graham.

That declaration, however, *refuted* Nidds' claim that the alleged statement shows *age* bias. The declaration says Graham complained about mechanics whom Beisenstein dubbed "Old Timers" (himself, Nidds and another), "**because** we . . . were allegedly **not doing what he was telling us to do or not doing it the way he wanted**." Taken at face value, therefore, *Graham said, a year or more before the layoff (i.e., shortly after hiring Nidds at age 54) that three mechanics whom Beisenstein considered "old timers" were insubordinate and refused to accept managerial direction.* This raised no reasonable inference that, *but for their ages,* Graham would not mind that they defied him. The lower courts properly concluded that this created no reasonable inference that it was because of Nidds' *age* that Graham, late the next year, concurred in Geesink's choice of Nidds for layoff.[29] The Beisenstein declaration raised no triable issue of pretext.[30]

The declaration of Julia Stuart, to which Schindler objected (and to which Judge Noonan's dissent and the petition refer), is worth even less. Stuart tried to put the pejorative words "old timer" and "new blood" in Graham's mouth (in January 1991, *after* the layoff, and at the time Graham offered Nidds *two* positions which had

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[29] *See, e.g., Testerman v. EDS Technical Products Corp.*, 98 F.3d 297, 305 (7th Cir. 1996).

[30] The rest of the declaration is, as set out in Schindler's objections (CR 110), hearsay, speculation and opinion.

become available). Stuart revealed, however, *in the declaration*, that she does "**not recall**" Graham using these inflammatory terms (although she put quotation marks around them); she also offered no context, and did not connect the words to Nidds or, indeed, to any of the 1990 layoffs.

The court of appeals held that, giving the declarations the most weight they reasonably could receive, these were "stray remarks" in light of all of the evidence, and did not raise a triable issue as to the truth of Schindler's reasons for including Nidds in the 1990 layoff.[31] *See Merrick v. Farmers Insurance Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990).[32]

3. Evidence Regarding July 1992 Layoff Does Not Show A Triable Issue Regarding Pretext

The reason for Nidds' July 1992 layoff was simple: Nidds so infuriated a major customer that the customer demanded that its account be reassigned to a prior

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[31] *See FDIC v. Henderson*, 940 F.2d 465, 473-74 (9th Cir. 1991), noting that alleged biased statements do not necessarily create a "genuine" fact issue precluding summary judgment on a discrimination claim even where the speaker's motivations are in issue.

[32] Biased statements have been held to create a fact issue in some cases, but those decisions involved substantially more evidence than this. For example, in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), there not only was an allegedly biased statement, but also objective evidence that the plaintiff substantially outperformed a younger recent hire who was retained when plaintiff was terminated. *See, also, Siegel v. Alpha Wire Corp.*, 894 F.2d 50 (3d Cir. 1990).

mechanic, at a time when another downsizing was in progress and there were no open jobs. Nidds did not dispute that he did the things of which Geneva Towers complained on June 25-26 (leaving the job one day to take care of personal affairs, and the next day after claiming that "a riot" threatened his safety). Nor did he dispute that on each of those days, Geneva Towers immediately complained to Schindler about Nidds and warned that a written complaint would follow.

Nidds merely disputed Schindler's explanation by making unsupported claims that Schindler had hatched a scheme to concoct complaints about him in complicity with Geneva Towers, and had induced Geneva Towers to falsely accuse him of not responding to a fictitious request for service when he was on vacation. (Petition, p. 3)[33] He offered no evidence, because there was none.

It is undisputed that Geneva Towers complained almost from the day Nidds started the route and demanded that he be replaced. It is undisputed that Geneva Towers is a very large account and the linchpin of the route. It is undisputed that Schindler and Geneva Towers responded appropriately to Nidds' claimed fear of crime. Nidds offered neither evidence nor law that, despite strenuous complaints from a major customer for the second time in a year, Schindler was obliged to keep him on during a downsizing.

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[33] Judge Noonan's dissent echoed comparable statements in Nidds' brief to the court of appeals, accepting at face value the legitimacy of Nidds' assertion that the record supported such statements.

The opinion of the court of appeals extensively reviews the evidence and quotes from it, including undisputed contemporaneous business records and the deposition of the person whose written complaint triggered the layoff. (Petition, App. A, pp. 17a-19a.) The court found that the evidence could not *reasonably* support the inferences of collusion proposed by Nidds. The nonmoving party on summary judgment is only entitled to have *reasonable* inferences drawn in his favor. *Matsushita Elec. Ind. Co. v. Zenith Radio,* 475 U.S. at 587-88. The court correctly concluded that Nidds had not raised a triable fact issue on his claim that the July 1992 layoff was retaliatory.

CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be denied.

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